Supreme Court, U.S.
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No. 01-___

IN THE

Supreme Court of the United States

GLOBAL NAPS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

AND

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of this Court's longstanding precedent in *ICC v. American Trucking Ass'ns*, 467 U.S. 354 (1984), may the Federal Communications Commission retroactively invalidate an interstate carrier's effective tariff without identifying any statutory provision that the tariff offends, solely because the tariff was found to conflict with agency regulations in a post-effectiveness challenge to its lawfulness?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following parties intervened in the proceeding in the District of Columbia Circuit:

Bell Atlantic-Delaware, Inc.
Bell Atlantic-Maryland, Inc.
Bell Atlantic-New Jersey, Inc.
Bell Atlantic-Pennsylvania, Inc.
Bell Atlantic-Washington, D.C., Inc.
Bell Atlantic-Virginia, Inc.
Bell Atlantic-West Virginia, Inc.
New York Telephone Company
New England Telephone and Telegraph Company

The companies above now operate under the name "Verizon Communications."

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that the parent company of Global NAPs, Inc. is Ferrous Miner Holdings, Ltd., a Delaware corporation, and that no publicly held corporation has a ten percent or greater ownership interest in Global NAPs, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Global NAPs, Inc. respectfully requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit. As noted below, this case is also appropriate for summary disposition pursuant to SUP. CT. R. 16.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is published at 247 F.3d 252 (D.C. Cir. 2001) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-14a. The *Order on Reconsideration* of the Federal Communications Commission ("FCC") is published at 15 F.C.C.R. 5997 (2000) and is reproduced at Pet. App. 15a-35a. The *Memorandum Opinion*

and Order of the FCC is published at 15 F.C.C.R. 12946 (1999) and is reproduced at Pet. App. 36a-57a. The court of appeals' order denying the petition for rehearing is unpublished. That order is reproduced at Pet. App. 58a.

JURISDICTION

The court of appeals entered judgment on April 27, 2001, and denied timely petitions for rehearing on June 29, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 10 of the Communications Act, codified at 47 U.S.C. § 160, authorizes the FCC to "forbear" from applying provisions of that Act to telecommunications carriers in certain circumstances. The complete text of Section 10 is reproduced at Pet. App. 59a-60a.

Section 201 of the Communications Act, codified at 47 U.S.C. § 201, requires common carriers to offer their services at just and reasonable rates. The complete text of Section 201 is reproduced at Pet. App. 60a-61a.

Section 203 of the Communications Act, codified at 47 U.S.C. § 203, requires common carriers to offer their services pursuant to tariffs filed with the FCC. The complete text of Section 203 is reproduced at Pet. App. 62a-63a.

Sections 203-205 of the Communications Act, codified at 47 U.S.C. §§ 203-205, give the FCC several tools to ensure that carrier tariffs are, and remain, just and reasonable, including the authority to review, revise, and suspend carrier tariffs if the FCC believes that there is a question of the lawfulness of the tariff. The complete texts of Sections 203-205 are reproduced at Pet. App. 62a-66a.

Section 208 of the Communications Act, codified at 47 U.S.C. § 208, establishes a complaint procedure by which private parties adversely affected by a carrier's actions may

obtain redress from the harm that they have suffered by virtue of the carrier's action. The complete text of Section 208 is reproduced at Pet. App. 67a-68a.

Section 251 of the Communications Act, codified at 47 U.S.C. § 251, prescribes rules designed to fundamentally restructure the local exchange market in order to foster competition in the delivery of telecommunications services. The complete text of Section 251 is reproduced at Pet. App. 68a-76a.

Section 252 of the Communications Act, codified at 47 U.S.C. § 252, establishes procedures for the negotiation, arbitration, and approval of interconnection agreements between local exchange carriers. The complete text of Section 252 is reproduced at Pet. App. 76a-83a.

INTRODUCTION

This case involves the review of a federal appellate court decision upholding an order of the Federal Communications Commission ("FCC") that retroactively invalidated an effective interstate tariff filed by Global NAPs, Inc. ("Global NAPs"), the petitioner here. The FCC retroactively invalidated Global NAPs' tariff, thereby rendering it void *ab initio*, solely on the basis of the agency's finding, after a complaint by another affected carrier, that the tariff violated two of the agency's rules.

In *ICC v. American Trucking Ass'ns*, 467 U.S. 354 (1984) ("*American Trucking*"), this Court addressed the circumstances under which an agency may impose what the Court acknowledged to be a severe penalty—retroactive cancellation of an effective tariff. The Court held that when an agency's enabling statute does not expressly provide for retroactive revocation of tariffs, the agency has the implied power to do so only if retroactive revocation (1) furthers a "specific statutory mandate" of the agency, and (2) is "directly and closely tied to that mandate." *Id.* at 367.

The Communications Act does not give the FCC express authority to revoke effective tariffs. Under *American Trucking*, this means that the FCC may retroactively cancel a tariff only if exercising that authority in a particular case furthers a specific statutory mandate and is directly and closely tied to that mandate. In its decisions below, the FCC neither addressed *American Trucking* nor identified a specific statutory mandate (or any statutory mandate at all) which the tariff supposedly contravened in a manner warranting retroactive invalidation.

In affirming the FCC, the D.C. Circuit panel below referred to *American Trucking*, but contradicted its holding. Under *American Trucking*, the prerequisite for retroactive invalidation is a conflict between the tariff and a specific congressional mandate to the agency. But the court below wrote Congress out of the picture by holding that the FCC could retroactively invalidate Global NAPs' tariff merely because it conflicted with the FCC's own regulations. The court thus eliminated entirely the requirement in *American Trucking* that the imposition of the drastic penalty of retroactive invalidation of a tariff must be tied (and closely so) to a ***statutory*** mandate.

Consequently, the D.C. Circuit's decision, if left to stand, vastly expands the power of federal agencies to retroactively void effective tariffs, irrespective of any statutory evidence that Congress intended an agency to have that power. In so doing, the court below erroneously dispensed with this Court's longstanding precedent.

STATEMENT OF THE CASE

Global NAPs provides telecommunications services to customers in Massachusetts and other states. Among Global NAPs' customers are Internet Service Providers ("ISPs") and other carriers, including Verizon Communications ("Verizon"). Global NAPs competes with Verizon for the business

of end user customers. It also provides services to Verizon when a Verizon customer makes a call to an end user that Global NAPs itself, as opposed to Verizon, serves. In such cases, the calls get from a Verizon customer to a Global NAPs customer by means of Global NAPs' services and facilities. Global NAPs and Verizon have physically interconnected their communications networks in order to ensure that these calls are indeed completed.

The FCC has repeatedly ruled that calls made to ISPs are largely interstate in nature and, therefore, under the FCC's regulatory jurisdiction. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 F.C.C.R. 3689 (1999) (hereinafter, "*Reciprocal Compensation Order*"), *vacated on other grounds, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). When Verizon hands off a call to Global NAPs for Global NAPs to deliver to an ISP, therefore, Global NAPs is providing an interstate service to Verizon. The FCC has recently adopted rules governing the compensation to be paid to a carrier in Global NAPs' position in handling such interstate ISP-bound traffic. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 F.C.C.R. 9610 (2001) (hereinafter, "*ISP Remand Order*"). Prior to that ruling, however, the FCC—while acknowledging the interstate nature of the traffic—expressly announced that it had no specific rules governing intercarrier compensation for it. *See, e.g., Reciprocal Compensation Order*, 14 F.C.C.R. at 3690, 3695. To fill that void, Global NAPs filed its tariff, which became the subject of the FCC's orders below.

The Communications Act of 1934, codified at 47 U.S.C. §§ 151-614 (1991 & Supp. 2000), as amended (the "Act"), contains very specific statutory language dealing with the

obligations of carriers to offer their services at just and reasonable rates, pursuant to tariffs filed with the FCC. 47 U.S.C. § 203. Pet. App. at 62a-63a. The Act also gives the FCC several tools to ensure that carrier tariffs are, and remain, just and reasonable as required by 47 U.S.C. § 201(b). 47 U.S.C. §§ 203-205. Pet. App. at 62a-66a. These provisions govern the FCC's authority to review, revise, and suspend carrier tariffs if the FCC believes there is a question of the lawfulness of the tariff.

Under Section 204, the FCC may reject a carrier's filed tariff before it becomes effective. 47 U.S.C. § 204. Pet. App. at 64a-66a. Section 204 also allows the FCC to suspend a tariff, and either investigate it prior to its effective date or allow it to take effect subject to refund if the investigation shows it to be unreasonable. *Id.* Pet. App. at 64a-66a. Under Section 205, the FCC may investigate an already effective tariff and, if it finds any defects, order prospective changes. 47 U.S.C. § 205. Pet. App. at 66a.

Section 208 establishes a complaint procedure by which parties adversely affected by a tariff that violates the Act or the FCC's rules may obtain redress for the harm that they have suffered by virtue of the violation. 47 U.S.C. § 208. Pet. App. at 66a-67a. Under Section 208, the complainant must show that it has been damaged, directly or indirectly, by a carrier's actions, and is entitled to "reparations," or "damages," caused by those actions. *Id.* Pet. App. at 67a-68a.

Global NAPs and Verizon are physically interconnected to exchange traffic with each other in furtherance of Verizon's duty to interconnect its network with competitors, *see* 47 U.S.C. § 251(c)(2). Pet. App. at 70a. Verizon and Global NAPs each have a duty to pay the other for the work entailed in completing calls that each may send to the other. *See* 47 U.S.C. § 251(b)(5). Pet. App. at 69a. During the time period relevant to this case, however, (a) the FCC's rules required

such compensation only for "local" traffic, *see* 47 C.F.R. § 51.701(b) (2000) (later modified by the *ISP Remand Order*, 16 F.C.C.R. 9610 (2001)); and (b) the FCC had expressly ruled that ISP-bound calls were not "local" in nature. *See Reciprocal Compensation Order*, 14 F.C.C.R. at 3701-03. There is therefore no necessary conflict between Section 251(b)(5), calling for negotiated intercarrier compensation, and tariffing intercarrier arrangements for non-local ISP-bound calls.

That said, carriers under Sections 251 and 252 of the Act may agree to interconnection arrangements that go beyond those mandated by the law. *See* 47 U.S.C. § 252(a)(1). It is therefore possible, as the FCC has recognized, that an interconnection agreement might require compensation for ISP-bound calls even though the statute and the FCC's regulations do not require this result. *See Reciprocal Compensation Order*, 14 F.C.C.R. at 3690, 3703-04. Global NAPs addressed this possibility in its tariff by expressly stating that the tariff did not apply to traffic for which payment was received pursuant to an interconnection agreement. Pet. App. at 86a-88a.[1] In practical terms, Global NAPs' tariff was necessary because Global NAPs was completing hundreds of millions of minutes of traffic from Verizon to its ISP customers each month, but Verizon was not paying for this service, either under the parties' interconnection agreement or otherwise. To the contrary, Verizon was affirmatively arguing to state regulators and, later, in federal court that its interconnection agreement with Global NAPs did ***not*** require payment for such calls. In these circumstances, no conflict between the tariff and Global NAPs' actual interconnection agreement with Verizon was possible.

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[1] Only Section 7 of the Tariff, titled "Interconnection Service" has been reproduced at Appendix F to this Petition.

Global NAPs filed the tariff at issue here on April 14, 1999. Pet. App. at 44a (¶ 11). The FCC's rules provide that tariffs filed by non-dominant carriers (such as Global NAPs) take effect on only one day's notice. *See* 47 C.F.R. § 61.23(c), Pet. App. at 84a. The tariff therefore took effect on April 15, 1999. Pet. App. at 44a (¶ 11). The FCC took no action on its own after Global NAPs filed its tariff. As a result, the tariff took effect as a lawfully binding statement of the terms applicable to the service Global NAPs provides in completing jurisdictionally interstate ISP-bound calls.

On July 8, 1999, after the tariff had been in effect for almost two months (and after Global NAPs had begun to bill Verizon pursuant to the tariff), Verizon filed a formal complaint challenging the tariff under Section 208 of the Act. Global NAPs disputed all of Verizon's claims. On December 2, 1999, the FCC issued an order deciding the complaint in favor of Verizon and retroactively invalidating Global NAPs' tariff. Pet. App. at 36a-57a.

The FCC held that the tariff violated two of its rules. First, the FCC found that the tariff violated 47 C.F.R. § 61.74(a), which provides that a tariff may not contain a cross-reference to an external document. Pet. App. at 56a (¶ 24). It also found that the tariff violated 47 C.F.R. § 61.2, which provides that tariff terms must be clear and explicit. Pet. App. at 55a (¶ 22). The FCC did not cite any statutory provision as the basis for voiding the tariff, nor did it explain how its decision to void the tariff retroactively satisfied the stringent criteria laid out by this Court in *American Trucking*. This is significant, in part, because in a Section 208 case the normal, appropriate remedy is damages, such as a refund of overcharges. *See New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 F.C.C.R. 5128, ¶ 14 (2000) (citing *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980)).

Global NAPs requested that the FCC reconsider its decision and pointed out that the agency had violated the law, and this Court's precedent, by retroactively voiding the tariff. The Commission denied Global NAPs' request for reconsideration; in so doing it failed even to address Global NAPs' argument that the FCC lacked authority, under this Court's precedent, to retroactively invalidate the tariff as opposed to merely declaring it to be unlawful prospectively and awarding any appropriate "reparations" to Verizon. Pet. App. at 15a-35a.

On review in the D.C. Circuit, Global NAPs again argued that the FCC's action in retroactively voiding the tariff constituted a clear violation of this Court's decision in *American Trucking*. The D.C. Circuit upheld the FCC's decision to invalidate the tariff retroactively. Although it gave lip service to the requirements of *American Trucking*, the D.C. Circuit ignored the requirements of that precedent by sustaining retroactive invalidation of the tariff based on nothing more than the fact that the tariff conflicted with the FCC's rules. Pet. App. at 12a-14a. Neither the court below nor the agency has ever purported to explain how the tariff supposedly conflicts with a specific statutory mandate, as required by *American Trucking*.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari in this case because the D.C. Circuit decided an important question of federal law in a way that conflicts with relevant Supreme Court precedent. Specifically, the D.C. Circuit's decision is fundamentally at odds with this Court's decision in *American Trucking*.

The question in *American Trucking* was whether the Interstate Commerce Commission ("ICC") had implied authority to retroactively invalidate effective motor carrier tariffs. *American Trucking*, 367 U.S. at 360-61. Congress had recently passed the Motor Carrier Act of 1980, which

established specific guidelines under which motor carrier rate bureau agreements were entitled to antitrust immunity. The ICC released an interpretative rule explaining how it planned to implement and enforce the new statutory guidelines for rate bureau immunity. It noted the "lack of definite remedies for proven rate bureau violations" and announced that if a carrier committed a significant violation of a rate bureau agreement, the agency would, in addition to withdrawing the carrier's immunity, retroactively revoke its tariff. *Id.* at 357.

The Court first noted that retroactive invalidation of an effective tariff is a drastic remedy that "can have serious consequences" for the affected carrier. *Id.* at 358.[2] It then examined whether the Interstate Commerce Act expressly authorized the ICC to revoke an already-effective tariff and concluded that it did not. The ICC argued that Section 10762(e) of the Interstate Commerce Act (49 U.S.C. § 10762(e)), which authorized the agency to "reject" a tariff under certain circumstances, could be read to include express authority to revoke an effective tariff. The Court disagreed and noted that the ability to reject a tariff connotes a "refusal to receive at the threshold," which is more limited than the power to revoke a tariff the agency has already accepted. *American Trucking*, 367 U.S. at 362.

The Court also pointed out that rejection under Section 10762(e) was a peremptory action for which "the carrier's only recourse is to submit a corrected tariff." *Id.* at 363. In contrast, other provisions of the Interstate Commerce Act

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[2] Retroactive invalidation is particularly harsh on carriers relying on the effectiveness of a tariff. If the tariff is merely found to be unlawful for some reason, then the agency would then determine whether and to what extent the unlawfulness harmed the complainant; in the typical case, this would be the difference between the tariffed "legal" rate for a service and the (presumably, lower) "lawful" rate for that same service. But if the tariff is deemed void *ab initio*, then the affected carrier has no immediate means to get paid for its services ***at all***, much less get paid a "just and reasonable" rate for them.

authorized the ICC to take less drastic steps to remedy defects in an effective tariff while providing more procedural protections for the issuing carrier. "It would be bizarre, to say the least," the Court held, "to interpret § 10762(e) to give the Commission peremptory authority to void effective rates retroactively, when § 10704(b) places procedural constraints on the Commission's authority to take the less drastic step of modifying effective tariffs prospectively." *Id.*[3]

In addition, the Court noted that its own past rulings, as well as those of the ICC, supported a narrow interpretation of the agency's ability to nullify effective tariffs:

> In *Berwind-White Coal Mining Co. v. Chicago & Erie R. Co.*, 235 U.S. 371 (1914), and again in *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924), we stressed the importance of common carriers' being able to rely on effective tariffs on file with the Commission. As the Commission itself once recognized, these cases "strongly [suggest] that recovery for a tariff's failure to comply with a formal requirement may be limited to the amount of damage suffered by the shipper." . . . Reading § 10762(e) to authorize retroactive rejection of effective tariffs would significantly undermine the repose that carriers have traditionally been permitted to enjoy once their tariffs have been accepted by the Commission.

Id. at 363 n.7 (citation omitted).

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[3] The Court also held that reading Section 10762(e) to allow the ICC to revoke effective tariffs would undermine restraints placed by Congress on the agency's power to suspend a proposed tariff pending investigation. The ICC's power to suspend a tariff is limited to the seven month period after its proposed effective date, and the ICC can only take final action in a suspension-investigation proceeding after a full hearing. "Were we to read § 10762(e) as broadly as the Commission proposes," the Court held, "the temporal and procedural constraints of [the statutory suspension provision] would be nugatory, since the Commission could rely on its rejection powers to void a regulation at any time and without any procedural safeguards." *Id.*

After concluding that the relevant statutory sections did not explicitly authorize revocation of effective tariffs, the Court set out a clear, two-part test for when such authority should be implied as part of an agency's discretionary power. The Court held that, "[t]o lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria: first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate." *Id.* at 367.

In *American Trucking*, the Court concluded that the ICC had such authority because both prongs of the test were met. It held that Congress clearly intended for the ICC to play a key role in enforcing the antitrust immunity guidelines for rate bureaus under the Motor Carrier Act of 1980. *Id.* at 368. On the "more difficult" question whether the power to revoke tariffs is closely and directly tied to the statutory mandate of policing rate bureaus, the Court noted that the ICC had taken "significant steps" to ensure that revocation would not be imposed unfairly[4] and concluded that the new penalty was "directly aimed at ensuring that motor carriers comply with the guidelines established by Congress in the [Motor Carrier Act of 1980]." *Id.* at 370.

The FCC's retroactive invalidation of Global NAPs' tariff raises the same question decided by this Court in *American Trucking*—namely, the extent of the agency's implied authority to retroactively void an effective tariff. The Commission voided Global NAPs' tariff solely on the ground that it violated two FCC regulations.[5] The Communications

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[4] *Id.* at 369, 370. For instance, the Court noted that "[u]nder the Commission's proposed scheme, effective tariffs will be nullified only upon findings of substantial violations of rate-bureau agreements." *Id.* at 370.

[5] As noted above, the FCC found that Global NAPs' tariff violated 47 C.F.R. § 61.74(a), which provides that a tariff may not contain a cross reference to an extraneous document, and 47 C.F.R. § 61.2, which

Act, like the Interstate Commerce Act, does not expressly authorize the retroactive revocation of an effective tariff. Pet. App. at 62a-66a. Instead, the Communications Act prescribes very specific ways in which the FCC can ensure that carrier tariffs are just and reasonable. It provides that the FCC may, under some circumstances, "reject" a proposed tariff offered for filing, Pet. App. at 63a;[6] "suspend" a newly-filed tariff during a hearing on its lawfulness, Pet. App. at 64a-66a; and investigate an effective tariff and, again after a hearing on its lawfulness, prescribe a lawful rate "to be thereafter observed." Pet. App. at 66a. It also provides that common carriers may be liable for damages if they violate the Act. Pet. App. at 67a. As the Court found in *American Trucking*, it would be "bizarre" to read a peremptory revocation power into these provisions because they authorize ***less drastic*** (i.e., prospective) action by the agency and provide ***more*** procedural protection for the carrier.

In the absence of any express authority in the Communications Act, the FCC did not have implied authority to retroactively revoke Global NAPs' tariff unless the two-part test in *American Trucking* was met. In neither its initial order nor its order denying Global NAPs' petition for reconsideration did the FCC respond to this argument, discuss *American Trucking*, or provide any analysis of the scope of its implied authority to invalidate tariffs retroactively.

The court below compounded the FCC's error of ignoring or overlooking this Court's binding precedent. The court below purported to apply *American Trucking*, but in fact plainly disregarded it and established a new and unsupported

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requires that a tariff be clear and explicit. *See* Pet. App. at 56a, 55a (¶¶ 24, 22).

[6] As the Court noted in *American Trucking*, the authority to reject a tariff at the time it is filed is substantially more limited than the power to revoke an already-effective tariff. *See American Trucking*, 467 U.S. at 362.

standard for when an agency may void an effective tariff retroactively. The court held that:

> The FCC found that the tariff, on its face, violated the plain meaning of the FCC's tariff regulations and therefore was unlawful from the date of issuance. This is sufficient to satisfy the test laid out in *American Trucking Ass'ns* as the FCC voided a tariff in furtherance of a "specific statutory mandate" to which the action was "directly and closely tied."

Pet. App. at 13a.

The court thus concluded, in effect, that *American Trucking* is satisfied—and an agency has implied authority to invalidate a tariff retroactively—if the tariff conflicts with one or more of the agency's regulations. No conflict with any statute at all—much less any "specific statutory mandate"—need be identified.

This ruling simply cannot be squared with the Court's holding in *American Trucking*. Neither the D.C. Circuit nor the FCC ever identified any section of the Act that provides a "specific statutory mandate" the FCC would advance by retroactively voiding Global NAPs' tariff. In *American Trucking*, the Court noted that Congress had given the ICC new authority to police rate bureau agreements and that the implied power to nullify a carrier's tariff was a "justifiable adjunct" to that new authority. *American Trucking*, 467 U.S. at 370. Here, in contrast, there is no new (or even not-so-new) statutory program to support the view that Congress has given the FCC this radical new power to retroactively void effective tariffs.

Indeed, in revising the Communications Act in 1996, Congress reaffirmed the importance of the traditional tariffing requirements by adding a new Section 10 of the Act, 47 U.S.C. § 160, which provides specific procedures by which the Commission may dispense with the obligation of carriers to file and abide by tariffs for their interstate communications

services. This new section resolves more than a decade of controversy (including controversy that has reached this Court) about when and whether the FCC may permit or require carriers to offer their services without the benefit of tariffs. *See MCI Tel. Corp. v. American Tel. and Tel. Co.*, 512 U.S. 218 (1994) (dispute over scope of tariffing obligation and FCC's authority to modify or eliminate that obligation). With specific statutory procedures in place for the FCC to do away with the tariffing obligation, it would seem all the more important, to maintain fidelity to the congressional plan, for the FCC to identify a specific statutory mandate allowing it to retroactively void a carrier's lawfully filed tariff.

The holding below removes ***Congress*** from the *American Trucking* equation altogether. Under the D.C. Circuit's new rule, an agency does not have to show that Congress intended for it to have the implied power to void tariffs—it merely has to find that a tariff conflicts with one of its own regulations and on that basis alone retroactively declare the tariff a nullity. This, in turn, has the obvious effect of vastly expanding the agency's power to void tariffs retroactively.

The significance of this expansion of implied agency authority is magnified because the decision was rendered by the D.C. Circuit, which hears many appeals in cases involving agency rate regulation. The D.C. Circuit's decision undoubtedly will support the conclusion by other federal agencies, including the Federal Energy Regulatory Commission and the Surface Transportation Board, that they, too, have implied authority to nullify an effective tariff solely because it is inconsistent with an agency regulation. Even if a case could be made as a policy matter that *American Trucking* unnecessarily restricts federal agencies charged with overseeing tariffs, and that this Court's test for implying a power to revoke should be relaxed, no such case has in fact been made. Instead, the D.C. Circuit panel has effectively overruled *American Trucking* sub silentio.

CONCLUSION

For the foregoing reasons, Global NAPs respectfully requests that the Court grant this petition for writ of certiorari. Because the decision of the D.C. Circuit is in clear and direct conflict with controlling precedent of this Court, Global NAPs also submits that this case is appropriate for summary disposition pursuant to SUP. CT. R. 16.1 and requests that the Court summarily reverse the D.C. Circuit's decision. *See Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999) (summary reversal appropriate to correct lower court's "demonstrably erroneous application of federal law").

Respectfully submitted,

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